

**Before the
Federal Communications Commission
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Request for Review of the Decisions of)	
the Universal Service Administrator by)	
)	
City of Newport News)	File No. NEC.471.12-16-99.2700001
Newport News, Virginia)	
)	CC Docket No. 02-6
Federal-State Joint Board on)	
Universal Service)	CC Docket No. 96-45
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association,)	
Inc.))	

To: Wireline Competition Bureau

**PETITION FOR RECONSIDERATION
AND PETITION FOR WAIVER**

The City of Newport News, Virginia ("Newport News"), by its attorneys, hereby submits this Petition for Reconsideration of the Order, 1/ issued by the Telecommunications Access Policy Division ("Division"), denying *Newport News's Request for Review* ("Request"). The Request sought review of a decision by the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company, which rejected Newport News's Funding Year 2000 Form 471, thereby preventing Newport News's receipt of \$213,275 in funding under the schools and libraries universal service support mechanism. SLD based its rejection on the fact

1/ Request for Review by City of Newport News, Federal-State Joint Board on Universal Service, File No. NEC.471.12-16-99.2700001, *Order*, DA 02-3256 (rel. Nov. 27, 2002).

that the Form 471, as initially submitted by Newport News, lacked a signature in Block 6. The Division's Order upholding this rejection is arbitrary and capricious, and should be reversed, and Newport News's request for waiver should be granted.

I. Factual Background

On December 10, 1999, Newport News mailed its Form 471 to SLD, 40 days in advance of the January 19, 2000 closing of the filing window for the 2000-2001 funding year. Newport News held a good faith belief that the Form 471 contained a signature when mailed, and, indeed, the multiple other forms enclosed in the same package were properly signed. On February 22, 2000, Newport News received a notification letter from SLD, dated February 16, 2000, indicating that Newport News's Form 471 was being returned without processing because it did not meet the Minimum Processing Standards, due to the lack of a signature. The letter further stated that,:

To be considered for E-rate discounts, your application must be corrected and resubmitted. To be considered within the Form 471 filing window for Fund Year 3, your new or corrected application must be received by 11:59 P.M., January 19, 2000.

Immediately upon receiving this notification, Newport News corrected the omission and, on the same day, mailed the corrected Form 471 back to SLD, along with an appeal requesting that the Form 471 be accepted as timely filed. In the appeal letter, Newport News explained that it could have complied with the January 19 filing deadline had the SLD reviewed the Form 471 prior to the deadline, but that such compliance was now impossible.

After additional correspondence and telephone calls requesting a decision from SLD. Newport News eventually received SLD's denial of the appeal, dated October 26, 2001, over one and one-half years later. On November 16, 2001, Newport News filed its Request for Review with the Division, which issued its Order over one year later, on November 27, 2002.

II. The Division Failed to Explain Its Departure from Past Precedent Permitting Signature Amendments to Form 470 in Similar Circumstances

In order to receive funding under the E-rate program, an applicant must first file Form 470 detailing the services for which it seeks discounts. Then later must file Form 471 to notify SLD of details relating to the actual services it has ordered. ^{2/} For both forms, a signature is required as part of SLD's "minimum processing standard." Thus, both forms are essential to the application process and are subject to the same signature requirements under SLD's rules.

In *Lettie Jensen*, a library applicant submitted its Form 470 without a signature on October 18, 2000. ^{3/} SLD notified the applicant of the missing signature some two months later, on December 19, 2000. The applicant signed the form and mailed it back to SLD the day after receiving the notification. However, given the two-month delay, it was impossible for the applicant to meet the two-part

^{2/} The filing of the Form 471 must occur: (1) at least 28 days after SLD has posted the applicant's Form 470 on its website, and (2) within the filing window established by SLD.

^{3/} Request for Waiver by Lettie W. Jensen Library, Amherst, Wisconsin, Federal-State Joint Board on Universal Service, File No. SLD-267950, Order, 16 FCC Rcd 18,526 (Conn. Car. Bur. 2001) (*"Lettie Jensen"*).

processing deadline by filing its Form 471 both 28 days after SLD's posting of its corrected Form 470 *and* prior to the January 18, 2001 filing deadline.

Consequently, SLD denied processing of the applicant's Form 471. In its request for review to the FCC, the applicant argued that, had SLD processed the form more promptly and notified it of the omission, the applicant would have been able to resubmit its Form 470 in time to comply with the dual filing requirements for the Form 471. Given these facts, the Bureau agreed, stating:

In accordance with our previous decisions, we agree with Lettie Jensen that it is entitled to a waiver of the filing window because SLD erred by unreasonably delaying its notification to Lettie Jensen of the problems with its Form 470. . . . ^{4/}

[W]e find that the period between October 23, 2000, when SLD received the Form 470 and December 19, 2000, when SLD mailed a notice to Lettie Jensen informing it of its failure to provide the authorized signature, constitutes an excessive delay by SLD which adversely affected Lettie Jensen's application. Had SLD informed Lettie Jensen of its mistake within a more reasonable timeframe, Lettie Jensen would have been able *to* resubmit its Form 470 early enough to comply with [the Form 471 filing rules]. We routinely encourage applicants to begin the application process as early as possible in order to deal with any problems that may arise. In this case, we find that, based on the early submission date of Lettie Jensen's FCC Form 470, SLD should have notified Lettie Jensen of the signature deficiency in the form in time for Lettie Jensen to submit an in-window FCC Form 471 ^{5/}

With the exception of the form number, the facts in Newport News's situation are virtually identical to those in *Lettie Jensen*. Newport News mailed its Form 471 well in advance (40 days) of the filing deadline, providing ample time for

^{4/} *Lettie Jensen* at ¶ 5.

^{5/} *Lettie Jensen* at ¶ 7.

SLD to check for the items necessary to comply with the minimum processing standard and to alert Newport News of any deficiency. Instead, SLD *took* approximately two months to accomplish this task – the same amount of time it took in *Lettie Jensen*, which the Bureau found to constitute an "excessive delay" in notifying the applicant of a failure to satisfy the minimum processing standard. ^{6/}

A conclusion that the SLD notification letter represented an excessive delay is even supported by the text of the letter itself, which is clearly a "form" letter generated from a standard template. The letter advised Newport News that, to be considered within the filing window, it must file a corrected Form 471 by January 19, 2000, an obvious impossibility given the February 16, 2000 date of the letter. If such post-deadline deficiency notices were considered standard practice, SLD presumably would have a different notification template that affirmatively indicates that the applicant has missed the filing window.

While *Lettie Jensen* and Newport News's case involved two-month processing delays, the Bureau has determined that a processing delay of as little as nine days can constitute an "excessive delay" for which relief is justified. For example, in *Alton Elementary School*, SLD posted the school's corrected Form 470 nine days after the school provided SLD with the additional information that made

^{6/} The decision in *Lettie Jensen* is consistent with *prior* Commission precedent that permits applications to be amended *nunc pro tunc* in order to correct signature deficiencies, where the equities support allowing such an amendment. See *Johnston Broadcasting*, 14 FCC 472, 474 (1950) (permitting the absence of a verification to be cured by amendment); *B.J. Hart*, 20 Rad. Reg. 301 (1960) (permitting the amendment of an application to provide a missing signature).

the form eligible for processing. ^{7/} This nine-day delay resulted in the inability of the school to comply with the 28-day waiting period while also filing its Form 471 within the filing window. The Bureau determined that such delay constituted a special circumstance that warranted a deviation from the general filing window rule, stating that “we do not want to penalize applicants in situations where the FCC Form 470 *could have been* posted” ^{8/} in time for the applicant to comply with the subsequent filing requirements. The Bureau should take a similar view here and avoid penalizing Newport News in a situation where its corrected Form 471 could have been filed within the filing window but for SLD’s unreasonable processing delay.

The Division has failed to justify the disparate standards it has applied to cases involving an unreasonable processing delay of the Form 470 that adversely affects applicants, and an unreasonable processing delay of the Form 471 that adversely affects applicants. In particular, the Order did not explain how it distinguished its past treatment of signatures missing from the Form 470, and Newport News’s situation, involving a signature missing from Form 471. As established above, both forms are an integral part of the application process and are governed by the same “minimum processing standard signature requirement.

^{7/} Request for Waiver by Alton Elementary School, Old Town, Maine, Federal-State Joint Board on Universal Service, File No. SLD-183987, **Order**, 17 FCC Rcd 733 (Com. Car. Bur. 2002) (“*Alton Elementary School*”).

^{8/} *Alton Elementary School* at ¶ 6 (emphasis added).

The Administrative Procedures Act (“APA”) requires that federal agency findings must be set aside if they are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” ^{9/} Specifically, APA violations are found where an agency deviates from a previously established policy without giving a reason. ^{10/} Because the Order fails to explain its rationale for changing the previously established policy of permitting a deviation of SLD’s filing window rule when excessive SLD processing delays adversely affect applicants, the Order is arbitrary and capricious, and should be reversed.

III. A Waiver of the Filing Window Rule is Justified

In its Request for Review, Newport News requested the FCC to permit its application to be processed, notwithstanding the fact that its corrected Form 471 was filed outside the applicable filing window. The Division should have automatically treated Newport News’s Request as a request for waiver, as it has done with other requests for review of SLD processing denials. ^{11/} To the extent the Division did not do so, Newport News hereby affirmatively seeks a waiver of the filing window.

^{9/} 5 U.S.C. § 706(2)(A).

^{10/} See *D&F Afonso Realty Trust v. Garuey*, 21G F.3d 1191, 1194 (D.C. Cir. 2000); *Public Citizen, Inc. v. FAA* 988 F.2d 186, 197 (D.C. Cir. 1993) (“The requirement that agency action not be arbitrary or capricious includes a **requirement** that **the** agency explain its result.”).

^{11/} See, e.g., Request for Review by South Barber Unified School District 255, Federal-State Joint Board on Universal Service, File No. SLD-158897, **Order**, 16 FCC Rcd 18435 (Conn. Car. Bur. 2001) at ¶ 5 (“*South Barber*”).

As the FCC has noted in previous grants of waivers, and as the D.C. Circuit has explained, a waiver is appropriate where special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. ^{12/} As the Division held in *Lettie Jensen*, a two-month delay in reviewing an E-rate application form for compliance with **the** minimum processing standards constitutes a "special circumstance." In this case, a strict adherence to the rule would be particularly detrimental to the public interest, as it would disproportionately impact low-income students. Approximately 46% of students enrolled in Newport News public schools come from economically disadvantaged households, and therefore do not have private resources for obtaining access to computers and the associated information technology services that have become a critical component in modern education. Thus, a strict adherence to the rule would adversely impact the very class of students about whom Congress was most concerned when enacting the E-rate program. ^{13/}

^{12/} See, e.g., Request for Review by West Allegheny School District, Imperial, Pennsylvania, **Order**, 16 FCC Rcd 15709 (Conn. Car. Bur. 2001) at n.17 (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

^{13/} Strict adherence to the rule would also create an extreme financial hardship for Newport News. The Bureau has previously held that financial hardships resulting from SLD processing delays can justify a waiver of the rules. See, e.g., Buffalo City School District, West Seneca, New York, Federal-State Joint Board on Universal Service, **Order**, 17 FCC Rcd 11881, 1885 (WCB 2002).

Moreover, to the extent the purpose behind the procedural filing rules is to ensure SLD's "ability to efficiently run the program." ^{14/} the proposed waiver would do nothing to undermine the rules' purpose. While strict adherence to the rules – even in cases where SLD's processing was unreasonably delayed – might result, in greater *expediency*, it does not improve *efficiency*, which necessarily includes a qualitative component. Efficiency is defined as the "capacity to produce the desired results with a minimum expenditure of energy, time, money or materials." ^{15/} Denying benefits to a school in great need, based on an easily-correctable administrative oversight, can hardly be a "desired result" of Congress's E-rate program, even if the procedures are accomplished with a "minimum expenditure" of effort on the part of SLD. Application denials that would not have occurred absent unreasonable SLD processing delays cannot be properly regarded as a means of "efficiently run[ning] the program."

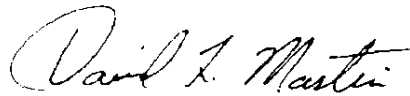
^{14/} *South Barber* at ¶ 7

^{15/} Webster's *Third International Dictionary* (1993) at 725

IV. Conclusion

For the reasons explained above, Newport News requests that the Division's Order be reversed **and** that Newport News's request for waiver of the filing window be granted so that its Form 471 **may** be processed.

Respectfully Submitted,



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